

HONORABLE THERESA L. FRICKE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALLSTATE INSURANCE COMPANY,
ALLSTATE PROPERTY & CASUALTY
INSURANCE COMPANY, ALLSTATE
INDEMNITY COMPANY, and
ALLSTATE
FIRE & CASUALTY INSURANCE
COMPANY,

Plaintiffs,

v.

TACOMA THERAPY, INC., TACOMA
REHABILITATION THERAPY, INC.,
P.S., ANDREW JACOBS, MELANIE
JACOBS, NANDY, INC., NATHAN
LEMINGS AND JANE DOE LEMINGS,
husband and wife, and the marital property
thereof, THE LAW OFFICE OF
MCLAUGHLIN &
ASSOCIATES, INC., WESLEY
MCLAUGHLIN AND JANE DOE
MCLAUGHLIN, husband and wife, and the
marital property thereof, DIRECT
SOLUTIONS MARKETING, INC., DOES
1-100 and ROES 101-200,

Defendants.

Case No. 3:18-mc-05022-RBL-TLF

**PLAINTIFFS' MOTION FOR
SANCTIONS AND FINDING OF
CONTEMPT**

Noting Date: April 26, 2019

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I. RELIEF REQUESTED

Plaintiffs Allstate Insurance Company, Allstate Property & Casualty Insurance Company, Allstate Indemnity Company, and Allstate Fire & Casualty Insurance Company (Plaintiffs) respectfully request that the Court award sanctions against Andrew Jacobs and Platinum Collision Center, LLC, dba Ace Autobody (Platinum) and find them both in contempt for failing to comply with this Court's Order of April 1, 2019, regarding Plaintiffs' postjudgment discovery requests.

II. RELEVANT FACTS

The relevant facts include the following:

- Plaintiffs issued postjudgment discovery consisting of debtor interrogatories and requests for production to Mr. Jacobs and a document subpoena to Platinum. Dkt. ## 1, 11-7, 11-9.
- This Court twice authorized the postjudgment discovery. Dkt. ## 3, 5.
- Plaintiffs twice served Mr. Jacobs and Platinum with the postjudgment discovery. Dkt. ## 11-1, 11-4, 11-6, 11-8.
- Mr. Jacobs and Platinum failed to respond to Plaintiffs' postjudgment discovery requests. Dkt. # 11 at ¶16.
- Plaintiffs engaged in discovery conferences with Mr. Jacobs and Platinum. Platinum was represented by counsel during its discovery conference. Dkt. # 11 at ¶¶17-19.
- Mr. Jacobs and Platinum failed again to respond to Plaintiffs' postjudgment discovery requests. *Id.* at ¶¶20-21.
- Plaintiffs moved to compel responses from Mr. Jacobs and Platinum. Dkt. ## 10, 11, 14, 16.
- Mr. Jacobs and Platinum were served with Plaintiffs' motion to compel. Dkt. # 12.
- Mr. Jacobs and Ms. McKernan filed objections/declarations to Plaintiffs' motion. Dkt. ## 13, 15.
- This Court granted Plaintiffs' motion and **specifically stated that Mr. Jacobs' and Platinum's failure to comply may subject them to contempt and an Order requiring them to pay the reasonable attorneys' fees of Plaintiffs.** Dkt. # 19 at 3.
- Since the Court's Order compelling discovery, neither Mr. Jacobs nor Platinum have responded to Plaintiffs' discovery requests.

1 III. ISSUE

2 **ISSUE:** Should the Court sanction Mr. Jacobs and Platinum and hold them in
3 contempt for failing to respond to Plaintiffs' discovery requests and to comply with this Court's
4 Order of April 1, 2019?

5 **ANSWER:** Yes.

6 IV. EVIDENCE RELIED UPON

7 Plaintiffs rely on the declaration of Mark B. Melter, the exhibits contained therein, and
8 the other pleadings and papers before this Court.

9 V. ARGUMENT

10 A. The Court should sanction Mr. Jacobs and Platinum for failing to respond to Platinum's
11 discovery.

12 Under Rule 37(d)(3), this Court "**must** require the party failing to act, the attorney
13 advising that party, or both to pay the reasonable expenses, including attorney's fees, caused
14 by the failure, unless the failure was substantially justified or other circumstances make an
15 award of expenses unjust." *RRW Legacy Mgmt. Grp., Inc. v. Walker*, No. C14-326 MJP, 2017
16 U.S. Dist. LEXIS 53206, at *4 (W.D. Wash. Apr. 6, 2017) (J. Pechman).

17 In this case, neither Mr. Jacobs nor Platinum have responded to Plaintiffs' discovery
18 requests and neither have any justification for their failure. Mr. Jacobs had provided nothing in
19 response to Plaintiffs' discovery. He is flagrantly disregarding the authority of this Court and
20 Plaintiffs' attempts to collect on their judgment. He should be sanctioned.

21 Platinum should also be sanctioned. Despite being represented by counsel at all material
22 times during this process,¹ Platinum has produced but a few pages of documents. Those include
23 documents that can be obtained through the secretary of state's website, a document stating Mr.
24 Jacobs was terminated by Platinum, and two purported power-of-attorney documents. Again,
25 this is despite Platinum being represented by counsel throughout most of this process.

26 Platinum has also filed FRCP 72 "objections" that do not identify anything that was
27 clearly erroneous in Magistrate Judge Fricke's Order, as is required by the rule, but are an
attempt to relitigate issues that have already decided. In doing so, Platinum asserts a swath of

¹ Mr. Morgan appeared on April 4, 2019, but was representing Platinum in another capacity prior to that date.

1 objections that were not raised previously or were resolved during a discovery conference in
 2 which, again, Platinum was represented by counsel. Platinum's untimely objections are waived
 3 and it cannot relitigate those issues now. *Richmark Corp. v. Timber Falling Consultants*, 959
 4 F.2d 1468, 1473 (9th Cir. 1992) (failure to timely object to the "discovery request, or at the
 5 very least in response to the motion to compel," rendered the objection waived). The Court
 should swiftly deny Platinum's Rule 72 motion.

6 Platinum argues that it needs more time to comply with Plaintiffs' discovery requests,
 7 yet it has refused to identify what responsive documents it has identified, let alone what
 8 documents it has already reviewed. In other words, it refuses to identify what it has done to
 9 comply with Plaintiffs' discovery requests. Assuming it has identified and reviewed any
 10 responsive documents, Platinum has so far failed to disclose those documents that are plainly
 responsive and nonobjectionable.

11 Finally, while Platinum's current counsel appeared last week, it was Platinum's decision
 12 to fire Mr. Kesling following the February discovery conference, to essentially ignore Plaintiffs'
 13 motion to compel, and to hire a new attorney who had an out-of-state conflict during the time
 14 that Platinum was supposed to be reviewing and producing documents. It is similarly perplexing
 15 that Platinum would not advise its current counsel of Plaintiffs' pending motions to compel
 after firing Mr. Kesling.

16 At any rate, there is no reasonable basis for Platinum's failure to respond to Plaintiffs'
 17 document subpoena. It appears to have done nothing since the Court's Order of April 1, 2019,
 18 which is consistent with what it did before that date. The Court should sanction Platinum and
 19 Mr. Jacobs in the amount of Plaintiffs' attorney fees for bringing its motion to compel, this
 20 motion, and responding to Platinum's frivolous Rule 72 motion (if required).

21 B. The Court should hold Mr. Jacobs and Platinum in contempt for violating the Court's
Order compelling production.

22 The Court should also hold Mr. Jacobs and Platinum in contempt for violating the
 23 Court's Order compelling production. This Court has the inherent power to hold a party in civil
 24 contempt in order to enforce compliance with an order of the court or to compensate for losses
 25 of damages. *RRW Legacy Mgmt. Grp., Inc., supra*, at *4 (citing *Powell v. Ward*, 643 F.2d 924,
 26 931 (2nd Cir. 1981)). Three elements must be satisfied as a prelude to a finding of contempt:
 27 (1) the order must be "clear and unambiguous," (2) the proof of non-compliance must be "clear

1 and convincing,” and (3) the party against whom the contempt finding is sought must not have
2 “been reasonably diligent and energetic in attempting to accomplish what was ordered.” *Id.*

3 All the elements are present here. There is nothing ambiguous about the Court’s Order
4 of April 1, 2019, requiring full compliance with Plaintiffs’ discovery requests. Yet neither Mr.
5 Jacobs nor Platinum have complied: Mr. Jacobs has not done anything, and Platinum filed a
6 motion arguing it shouldn’t have to. Finally, there is no evidence that Mr. Jacobs or Platinum
7 have been reasonably diligent in attempting to accomplish the Court’s Order. To the contrary,
8 the evidence indicates both parties have ignored the authority of this Court and disregarded its
9 Order without sufficient legal basis. The Court should find both parties in contempt and
10 sanction them to a fee of \$1,000 per day, starting from April 10, 2019, until they comply in full.
11 *RRW Legacy Mgmt. Grp., Inc., supra*, at *7-8 (finding third party in contempt for failing to
12 respond to postjudgment discovery and awarding a sanction of \$1,000 per day).

13 VI. CONCLUSION

14 For the reasons set forth above, the Court should sanction Mr. Jacobs and Platinum in
15 the amount of Plaintiffs’ attorney fees. The Court should further find both parties in contempt
16 and sanction them \$1,000 per day, as of April 10, 2019, until they respond in full to Plaintiffs’
17 discovery requests.

18 DATED THIS 11TH DAY OF APRIL, 2019.

19 FAIN ANDERSON VANDERHOEF
20 ROSENDAHL O’HALLORAN SPILLANE, PLLC

21 By: /s Mark B. Melter

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April, 2019, I electronically filed **PLAINTIFFS' MOTION FOR SANCTIONS AND FINDING OF CONTEMPT** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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Signed at Seattle, Washington this 11th day of April, 2019.

/s/Donna Steinmetz

Donna Steinmetz, *Legal Assistant*